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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 15.

E. P. JACOBS and AUGUSTUS GUNTER, Executor of the Last Will of MRS. S. B. GUNTER, Deceased,
Petitioners,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONERS.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 38) is reported in 63 F. (2d) 326.

JURISDICTION.

The judgment sought to be reviewed was entered February 13, 1933 (R. 40). Petition for certiorari was

granted May 8, 1933 (R. 41). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether in a suit against the United States under the Tucker Act for the taking of a right of flowage over petitioners' lands resulting from the construction of a dam authorized by Act of Congress, petitioners may recover the equivalent of interest on the amount of damage to their lands at the time of the taking, as just compensation for delay in payment.

STATUTES INVOLVED.

Section 177 of the Judicial Code (U. S. C., Title 28, Sec. 284) provides:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. * * *"

The construction of Widow's Bar Dam was authorized by the Rivers and Harbors Act of July 27, 1916, by the following provision (39 Stat. 391, 399):

> "* * * for continuing improvement by the construction of locks and dams between Chattanooga, Tennessee, and Browns Island, Alabama, in accord-

ance with the report submitted in House Document numbered three hundred and sixty, Sixty-second Congress, Second Session, as modified by the report of the Board of Engineers for Rivers and Harbors printed in Rivers and Harbors Committee Document numbered one, Sixty-fourth Congress, First Session, $500,000:

"Provided, That no contract shall be entered into for the construction thereof until the local interests shall assume and pay all claims for flowage damage or arrange to do so in manner satisfactory to the Secretary of War: Provided, Further, that one high dam or two low dams may be constructed according as the local interests may contribute the cost of all claims for flowage damage arising from either type of dams, respectively."

The Act of March 2, 1919 (40 Stat. 1275, 1282) contained the following provision:

"Tennessee River, Tennessee, Alabama, and Kentucky.—The Secretary of War is hereby authorized to prosecute the work of improvement on the existing project for the section between Chattanooga and Browns Island in accordance with the recommendation in report submitted in Rivers and Harbors Committee Document numbered 8, Sixty-fifth Congress, Third Session, that the condition precedent requiring local interests to assume and pay all claims for flowage damages be waived."

STATEMENT.

The work was done by building a dam across the Tennessee River at Widow's Bar, some eight (8) miles below the lands of these petitioners, which impeded the natural flow of the river and caused flowage damage to petitioners' lands. This work was completed and the lands overflowed on October 1, 1925 (R. 22).

Later, the United States caused surveys to be made and ascertained that flowage easements in 115.2 acres of the lands of petitioner Jacobs, and 34.59 acres of the lands of petitioner Gunter's intestate, were actually taken by reason of the construction of this Widow's Bar Dam (R. 24). After negotiations and offers of settlement, each of petitioners brought these proceedings under the Tucker Act, in the United States District Court of their residence (R. 1-12).

At the first trial the District Judge dismissed the proceedings because the flooding was intermittent and petitioners had not been wholly evicted thereby (R. 13). By agreement, the Gunter case was held in court to await an appeal in the Jacobs case (R. 18). Upon appeal the Circuit Court of Appeals for the Fifth Circuit reversed the judgment in the Jacobs case and held that the land of petitioner had been taken, that he was entitled to just compensation therefor and remanded the case to ascertain the amount of just compensation (R. 13).

Jacobs v. U. S., 45 F. (2d) 34.

On the second trial the cases were consolidated (R. 19), and judgment was entered by the District Judge for the value of the land taken, together with interest at the rate of 6 per cent from the date of the taking, in favor of each of petitioners (R. 19). This was appealed by the United States (R. 31), and the Circuit Court of Appeals affirmed the judgment as to the value of the land taken, but denied interest from the date of the taking (R. 38). In ruling on this question the Circuit Court of Appeals said:

> "In condemnation proceedings instituted by the Government interest is allowed from the date of the actual taking as a part of just compensation under the Fifth Amendment (United States v. Rogers, 255 U. S. 163). As a general rule, however, except where otherwise provided by agreement or by the express words of a statute, interest is not recoverable in suits brought against the United States upon unpaid accounts or claims (Boston Sand Co. v. United States, 276 U. S. 41). And it is provided by statute that 'no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest,' etc. (Revised Statutes, Sec. 1091; 28 U. S. C. A., Sec. 284). This statute applies equally to District Courts exercising jurisdiction under the Tucker Act 'concurrent with the Court of Claims' (28 U. S. C. A., Sec. 41 [20]). As the sovereign cannot be sued without its consent, it was competent for Congress in giving consent to suits against the United States upon private claims to impose the condition that such claims should not draw interest. Interest may not be collected 'when the Government

without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title,' because the property owner's only right to bring suit against it in the Court of Claims or in a District Court is not founded upon the Fifth Amendment, but upon the existence of an implied promise or contract to pay the value of the property taken (United States v. North American Co., 253 U. S. 330). The just cited case is controlling on the question now under consideration. The suit there, as here, was held to be upon an implied contract. There is nothing in conflict with it in other Supreme Court decisions relied on by appellees. United States v. Rogers, 255 U. S. 163, and Seaboard Air Line Rwy. v. United States, 261 U. S. 299, were condemnation cases. In each, the North American case was referred to and distinguished on the ground that it was not a condemnation case. In United States v. Cress, 243 U. S. 316, in the course of the opinion the statement was made that the judgments entered in the court below included interest, and those judgments were affirmed. But it was not stated that the interest ran from the date the property was taken, and for all that appears interest was calculated only from the date of the judgment. In Hurley v. Kincaid, 285 U. S. 95, the question of interest was not considered." (R. 39).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in reversing the judgment of the District Court and holding that petitioners were not entitled to interest from the date of the taking of their property as just compensation for delay in payment.

SUMMARY OF THE ARGUMENT.

First. These proceedings are part of the authorized procedure instituted by the United States for the condemnation of land, and the measure of recovery in condemnation cases is applicable.

Second. The contract of the United States to pay just compensation for petitioners' land, which is implied from the fact of the taking, includes some equivalent for delay in payment. Interest, as allowed by the District Judge, is a good measure of that equivalent.

Third. The additional amount for which petitioners contend in these cases is not a claim for interest within the purpose and intention of Sec. 177 of the Judicial Code. It is a part of the "just compensation" guaranteed to them by the Constitution.

Fourth. The case of **North American Co. v. United States, 253 U. S. 330**, held to be controlling by the Circuit Court of Appeals, is distinguished from the instant cases.

Fifth. The holding of the Circuit Court of Appeals is contrary to and in conflict with prior decisions of this Court.

ARGUMENT.

First. The federal statutes make it the duty of the Secretary of War to institute proceedings for the condemnation

> "of any lands, easements or rights of way needed for a work of rivers and harbors improvements" (U. S. C., Title 33, Sec. 591),

and that the Secretary of War

> "shall have the right to take immediate possession of said lands, easements or rights of way, to the extent of the interest to be acquired" (U. S. C., Title 33, Sec. 594).

Under this authority the Secretary of War took "immediate possession" of petitioners' lands by the construction and closing of the dam on October 1, 1925. He then proceeded to ascertain the amount of the damage by surveys and make offer to pay the amount so ascertained (R. 25). Petitioners were not satisfied to accept the offers made and brought these proceedings, wherein it was adjudged that they were entitled to several times the amount offered (R. 28).

While the statute gives the right of "immediate possession" because the public necessity cannot wait on the procedure to ascertain the amount of the compensation,

title does not vest in the United States until the amount of compensation is ascertained and payment made.

Mason City & Ft. Dodge Rwy. Co. v. Boynton, 204 U. S. 570;
Cherokee Nation v. Southern Kansas Rwy. Co., 135 U. S. 641;
Kennedy v. Indianapolis, 103 U. S. 599;
Brownsville v. Cavazos, 100 U. S. 138;
United States v. Lynah, 188 U. S. 445.

The Constitution makes it the duty of the United States, before taking title to petitioners' lands, to ascertain and pay just compensation (Garrison v. Mayor etc. of New York, 88 U. S. 196), and the statute had charged the Secretary of War with the discharge of this duty (U. S. Code, Title 33, Sec. 591). The required proceeding to ascertain the amount of compensation to be paid is not an adverse lawsuit in the ordinary sense, but a mere "inquisition to establish a particular fact" (United States v. Jones, 109 U. S. 513). It is a necessary proceeding to complete the condemnation and vest title in the United States.

The flooding of petitioners' property by this dam across the Tennessee River, completed October 1, 1925, was a taking, from the time the dam was completed (U. S. v. Lynah, supra; Hurley v. Kincaid, 285 U. S. 95). This taking was pursuant to statute and lawful. The statutes also provided procedure for ascertaining the value. One

statute authorized the Secretary of War to institute the proceeding. Another statute authorized these petitioners to institute the proceedings in case the Secretary of War failed to do so (U. S. v. Lynah, supra; Hurley v. Kincaid, supra). The proceedings by these petitioners seek nothing except ascertainment of the just compensation due them. If these proceedings had been instituted in the name of the United States by the Secretary of War, the Court could do no more than adjudicate the amount of compensation due. The power of the Court and the question involved is exactly the same in both proceedings. One or the other is necessary to complete the condemnation, and vest title in the United States.

Second. It may well be doubted whether the fiction of implied contract is necessary to confer upon the District Court jurisdiction of proceedings of this kind, since the provisions of the Tucker Act carried into the U. S. Code at Sec. 41 (20), Title 28, embrace "claims not exceeding $10,000.00 founded upon the Constitution of the United States, * * * or for damages, liquidated or unliquidated, in cases not sounding in tort." It is also doubtful whether these suits are founded upon implied contracts.

Garrison v. Mayor etc. of New York, supra;
Seaboard Air Line Rwy. v. U. S., supra.

However, accepting the theory of implied contract, the question arises: What is the contract? The Circuit Court

of Appeals in the instant case had construed the contract to be that the United States would pay the value of the land taken, at some future time, when that value was ascertained.

We respectfully insist that such was not the contract which the law implies, because where the owner has been deprived of valuable use of his property, payment at some future time is not "just compensation," within the constitutional requirement.

Bowman v. Ross, 167 U. S. 548;
U. S. v. North American Co., supra;
U. S. v. Rogers, supra;
Seaboard Air Line Rwy. v. U. S., supra.

Since the payment of just compensation is a condition precedent to vesting title, the implied contract must be to pay "just compensation" as required by the Constitution and defined by this Court.

Such just compensation includes more than the value at the time of the taking, paid at a subsequent time. It includes interest or some other equivalent for the delay in payment. Hence, we insist that the contracts included some equivalent for the delay in payment and that interest as allowed by the District Judge is "a good measure" of that equivalent.

Seaboard Air Line Rwy. v. U. S., supra;
U. S. v. Rogers, supra.

Third. In the instant cases the per cent added by the District Judge for delay was a part of the "claim" itself, and not interest added within the meaning of Sec. 177 of the Judicial Code (Phelps v. U. S., 274 U. S. 343). It may be called interest only in the sense that it is part of what the contracts "stipulate" shall be paid. In that sense it comes within the meaning of this statute as interest "expressly" stipulated. This view is supported by these rules of construction:

A contract is to be construed according to the intention of the parties, and what is implied is as effectual as what is expressed.

> Equitable Ins. Co. v. Hearne, 20 Wall. 494;
> U. S. v. Babbitt, 95 U. S. 334.

A statute is to be construed to effectuate the legislative intention, and a case within the intention must be considered within the letter of the statute.

> U. S. v. Wittberger, 5 Wheat. 76;
> Ingleheart v. Ingleheart, 204 U. S. 478;
> Rodgers v. U. S., 185 U. S. 83.

Here we have implied contracts which included interest or other equivalent for the delay in payment. We are considering the application to these contracts of a statute, the purpose of which was to prohibit the allowance of interest unless interest was intended by the parties. The words "unless upon a contract expressly stipulating for

the payment of interest," as used in this statute, must be construed to mean that it shall appear to the Court that the parties intended the payment of interest. Otherwise, the letter of the statute will defeat the purpose of the parties and impair the obligations of the contract.

Templers etc. Co. v. Jarman, 187 U. S. 197.

Another applicable rule is to adopt that construction which will save the constitutionality of the statute.

Grenada Co. Supervisors v. Brown, 112 U. S. 261;
The Japanese Immigrant Case, 189 U. S. 86;
Miller v. U. S., 11 Wall. 268.

If the statute is construed to limit the power of the Court to award just compensation, then it is invalid, because "just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function."

Seaboard Air Line Rwy. v. U. S., supra;
Monongahela Nav. Co. v. U. S., 148 U. S. 312.

Fourth. The Circuit Court of Appeals applied to the instant cases the holding of this Court in U. S. v. North American Co., supra.

We insist that case is distinguished from the instant cases on these grounds:

(a) The District Judge found as a fact in these cases

that the addition of 6 per cent per annum was necessary to give petitioners the just compensation to which they were entitled.

In the North American case there was no such finding. On the contrary, this Court, in its opinion, says:

> "The facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest" (253 U. S. 338).

(b) The instant cases are necessary parts of condemnation proceedings to ascertain the value of property taken for public use by an officer of the United States pursuant to statutes authorizing the taking.

The North American case was not a condemnation proceeding. It was brought to recover the value of property which had been seized by a general of the United States Army without authority. The suit had been pending two years before the United States took legal possession of the property. The second count of the petition was for rent alleged to have accrued during the time the property was unlawfully held. For this the United States was not liable, nor was it liable for the property itself when the suit was brought. It became liable before judgment, and the amount of that liability was allowed. The Court referred to the fact that there was a long delay in the litigation as a matter for which the owner may have been largely responsible.

The claim of the owner was that interest accrued as a

matter of law. This claim was rejected and interest denied in accordance with the rule that interest is not to be added unless necessary to give to the owner just compensation.

Shoemaker v. U. S., 147 U. S. 282.

(c) The property for which compensation is sought in the instant cases is situated in the State of Alabama. The laws of that state "relating to suit for condemnation of property" provide that interest shall be added from the time of the taking.

Jones v. N. O. & S. R. R. Co., 70 Ala. 227;
U. S. v. First Natl. Bank, 250 Fed. 299.

The federal statute under which this property was taken provides that proceedings to ascertain the value

> "shall be prosecuted in accordance with the laws relating to suits for the condemnation of property of the state wherein the proceeding may be instituted (U. S. Code, Title 22, Sec. 591).

This statute adopts the local law as the applicable rule in these cases.

In the North American case the property was situated in Alaska. There was no local law to be adopted, and the opinion of this Court distinguished that case from cases controlled by the local laws of the states on that ground (253 U. S. 335).

Fifth. If the rule announced by the Circuit Court of Appeals in this case prevails, then the amount which the landowner will receive for property taken for public use will be greater when the United States institutes the proceedings for condemnation than it will be if the landowner, after negotiating for some years, is compelled to institute and prosecute such proceedings through the courts. In this case six years elapsed and the recovery of the landowners was increased 36 per cent because of the delay. If the landowner must suffer this much loss because the United States failed to institute proceedings for condemnation, then the remedy which is afforded to him by suit at law is not adequate. In justice, he ought to be permitted to maintain injunction against the United States to restrain it from taking possession until or unless condemnation proceedings are instituted by it or payment is made at the time of the taking.

But this Court has ruled that he cannot maintain such injunction because his remedy at law will give the same compensation.

Hurley v. Kincaid, supra.

In the instant case the lower court disposed of the above-cited holding of this Court with the statement: "The question of interest was not considered." We most respectfully insist that the question of interest was considered and ruled with petitioners' contention. The ground of the decision of this Court in the Hurley case was that

the measure of compensation is the same, regardless of the procedure to ascertain it. In so holding, this Court necessarily considered that interest will be added in the one proceeding as well as in the other when the rule of just compensation requires it.

In Seaboard Air Line Rwy. v. U. S., supra, this Court held that in a suit brought in the District Court against the United States to recover just compensation for property taken, plaintiff was entitled to recover interest from the date of the taking, as a "good measure" of the equivalent for delay in payment.

Of that case this Court said:

> "This suit is a part of the authorized procedure instituted by the United States for the condemnation of land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. * * * The only question here is whether the payment at a subsequent date of the value of the land as of the date of the taking is sufficient to constitute just compensation. * * *
>
> "The requirement that just compensation shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation" (261 U. S. 299).

In Phelps v. U. S., supra, this Court held that in a suit brought in the Court of Claims against the United States

to recover the rental value of a pier in the New York harbor, requisitioned for war purposes, the plaintiff was entitled to interest for delay in payment as part of just compensation.

It was insisted there as here that Sec. 177 of the Judicial Code prohibited the allowance of interest. This Court said:

> "Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking" (274 U. S. 343).

In the case of Seaboard Air Line Rwy. v. U. S., supra, the action in the District Court was authorized by the same statute which authorized the taking. Here, the taking was authorized by one statute, and the action by another. This should not distinguish the cases. There is no other difference.

In Phelps v. U. S., supra, the taking was authorized by one statute and the action by another, just as here.

In those suits, the property was taken for war pur-

poses. Here, it was taken for navigation purposes. But, the same constitutional requirement of just compensation applied alike in those cases as here.

For those reasons, we insist that the Circuit Court of Appeals erred, and its decision should be reversed.

Respectfully submitted,

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